

MANAGEMENT OF INDIAN TRIBAL TRUST FUNDS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

UNITED STATES TRUST RELATIONSHIP WITH THE SOVEREIGN
GOVERNMENTS OF INDIAN COUNTRY

FEBRUARY 26, 2002
WASHINGTON, DC

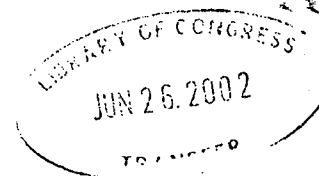


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While the private trust industry might provide useful models after the relevant legal duties are identified, ITMA submits that the most modern, efficient and competent regime of trust administration known to man will fail by its business culture. It is characterized by the determination to hide losses, cover up theft and bury mistakes in buzz words and blizzard of promises.

In conclusion, ITMA takes no pride or pleasure in expressing such dissatisfaction with our government agencies. It is our government, too. We continue to have faith that those in charge of it will step forward to restore the faith and the honesty of what Thomas Jefferson once called the last best hope of mankind on Earth. Toward that end, we earnestly seek the diligence of this committee in continuing to champion the goal. We stand ready to provide whatever additional information the committee might request of us.

Thank you for your consideration.

[Prepared statement of William Martin appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Martin.

As chairman of this committee, it should be noted that I am part of the Government of the United States. And I hope that all of you would believe me when I say that I take my responsibilities and my trust obligations to Indian country very seriously.

As chairman of this committee, let me assure you that this committee will not consider any proposal that is not the product of open and free negotiation and consultation. I will be conferring with the Secretary of the Interior. I have met her several times. She is a good woman and I am certain her heart is in the right place. I hope that all of you will take this role responsibly, those of you on the Task Force, because the time is now. If we don't resolve this now, it will be another 10 years. And I have no idea who will be sitting here 10 years from now.

So with that, I thank all of you for your patience, for your testimony, and for your suggestions. And we will be do our part, I can assure you of that.

With that, the record will be open for 30 days if you want to submit addendum or corrections, please feel free to do so, and I invite all tribal leaders if they have statements they wish to have placed in the record, it will be done. I have a request from the Secretary, Mr. McCaleb that the statement of Secretary Norton be made part of the record, an article entitled "American Indian Trust Reform: The Challenge to Consensus." Without objection, that statement is made part of the record.

[Referenced document appears in appendix.]

The CHAIRMAN. With that, the hearing is adjourned.

[Whereupon at 1:18 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, SENATE COMMITTEE ON INDIAN AFFAIRS

Good morning and thank you Mr. Chairman for convening this important hearing. Unfortunately, all who have chaired this committee at some point must dedicate enormous time and effort in trying to reform the Indian Trust Fund Management systems.

You have done it in the past, Chairman Inouye, I did it for 5 years and now it's your turn once again. It's beyond frustrating for me and for the Indian beneficiaries as well.

Let me start off by saying that this issue is clearly a problem of historic proportions: It is not Secretary Norton's creation. When I chaired this committee I acknowledged the same fact to Secretary Babbitt.

Nonetheless, what Congress passed in 1994 to reform this system was enacted over the objections of the last Secretary of the Interior. My own opinion is that despite the 1994 Act and the vigorous involvement and encouragement of this committee, the trust reform strategy of the last Administration was to litigate, lurch from hearing to hearing by putting on a brave face and a dog and pony show, and do everything they could to make sure the Federal funding spigot didn't get turned off.

That strategy, as we all know and surely must recognize today, not only didn't work, Mr. Chairman but has in fact led us directly to where we are today.

Mr. Chairman, this reads like a bad soap opera: We have had several bills signed into law; documents lost, contaminated and shredded; Federal lawsuits filed; senior department officials resign and being held in contempt by a Federal judge; and countless hours of legislative and oversight hearings. Just 2 weeks ago we passed out of committee legislation designed to discourage more litigation and encourage the tribes and the Department to negotiate settlements which I believe is the much better option for all parties.

Having said that, we stand at a cross-roads here—a historic moment where I think if we recognize and admit that the litigation has served its purpose, but ultimately these issues should be, and I think will be, resolved here in Congress through a settlement bill.

Frankly, this committee—and the chairman and I—have done, are doing, and will continue to do everything we can to bring fair and equitable resolution to these issues but it requires some healthy, honest and open debate and one that may not have been held before.

Unlike many who have criticized her proposal, I believe the Secretary should be lauded, not criticized, for making a proposal to reform the way the United States handles Indian money and Indian assets.

There are tribal proposals as well and we'll hear a little about them today too.

Some fundamental realities we all need to acknowledge are:

No. 1. The status quo is unacceptable: It's unacceptable to the Secretary, to the tribes, to the court and to this committee.

No. 2. Right to the present day, the current system is not meeting the standards of performance that it should be—that's why I proposed an independent "Indian Trust Corporation" in February 2000.

No. 3. Whether the answer lies in the Secretary's idea, in receivership, in the trust corporation or in any other form, I firmly believe we should analyze them without passion or prejudice and get in place a system that brings justice to Indians which, after all, is what this should be all about.

In closing, let me say something about "Consultation". When the Secretary informed me of her proposal to reform the trust, I encouraged her and the Department to consult early and often with the tribes.

Three months later, close to 10 consultation meetings have taken place. The Secretary herself attended the first meeting in Albuquerque. Nonetheless, Secretary Norton is being criticized for not conducting more consultations.

In 1 year, this Secretary and high-level Department officials have met and consulted with the tribes more often on Indian Trust Reform issues than the past Administration did in 8 years. That—ladies and gentlemen—is a fact.

I do hope, Mr. Chairman, that with this hearing the committee can spark the kind of healthy and constructive dialog that is so needed at this point in time.

With that, I ask unanimous consent that my formal statement be included in the record along with some additional materials.

Thank you Mr. Chairman.

TRUST FUNDS TIME-LINE

Acronyms

AITFMRA—American Indian Trust Fund Management Reform Act, P.L. 103-412 (October 25, 1994)

DoI—Department of Interior

GAO—General Accounting Office

SCIA—Senate Committee on Indian Affairs

Important Events

September 8, 1982, "Major Improvements Needed in the BIA" Accounting System," (GAO/AFMD-82-71).

January 11, 1984, Price Waterhouse, "In-Depth Review of the Indian Trust Funds for the Bureau of Indian Affairs, Task V Recommendations." (Discussed in April 22, 1992 report "Misplaced Trust" from House Committee on Government Operations at the text accompanying footnote #53.)

April 15, 1987, BIA publishes Request for Information for transferring Indian trust fund management to the private sector. More than 100 responses were received.

December 27, 1987, Supplemental Appropriations Act, P.L. 100-202 and P.L. 100-446, September 27, 1988, include a directive preventing the BIA from transferring trust accounts to a private institution until they are reconciled.

October 26, 1989, Secretary Lujan, issues Secretarial Order 3137, Establishment of the Office of Trust Funds Management, BIA.

May 11, 1990, Arthur Andersen & Co., "Tribal and Individual Indian Monies Trust Funds, Report of Independent Auditors," Financial Statements as of September 30, 1989 and 1988.

July 2, 1990, Secretary Lujan, issues an amendment to Sec. Order 3137; material to be included in the Departmental Manual by January 1, 1991.

November 5, 1990, Interior Appropriations Act, P.L. 101-512 tolls statute of limitations until reconciliation ordered by Committee is scheduled to be completed. The Act also requires independent certification that reconciliation results are the most complete reconciliation possible.

April 11, 1991, "Bureau of Indian Affairs Efforts to Reconcile and Audit the Indian Trust Funds," (GAO/T-AFMD-91-2).

May 20, 1991, "Bureau of Indian Affairs Efforts to Reconcile and Audit the Indian Trust Funds," (GAO/T-AFMD-91-6).

April 2, 1992, "Financial Management: BIA Has Made Limited Progress in Reconciling Indian Trust Funds and Developing a Strategic Plan," (GAO/AFMD-92-69).

April 22, 1992, House Government Operations Committee approves and adopts a report from its Subcommittee on Environment, Energy, and Natural Resources: "Misplaced Trust: The Bureau of Indian Affairs Mismanagement of the Indian Trust Fund," H.Rep. 102-499.

July 2, 1992, SCIA oversight hearing, S. Hrg. 102-856, on land fractionation and BIA financial management with the GAO as the principal witness testifying on its reports: "Profile of Land Ownership on 12 Reservations," (GAO/RCED-92-96BR)

February 1992, and "Problems Affecting BIA Financial Management," (GAO/T-AFMD-92-12) July 2, 1992 ("The bulk of problems are internal to BIA "things such as poorly designed accounting systems, weak internal control, and trained staff.")

August 12, 1992, SCIA oversight hearing, S. Hrg. 102-939, on Indian Trust Fund Management, S. Hrg. 102-939. Financial Management; BIA Has Made Little Progress in Reconciling Trust Accounts and Developing a Strategic Plan, (GAO/AFMD-92-38) June 1992. ("The unreconciled accounts are only a symptom and not a cause of BIA's trust fund financial management problems.")

June 22, 1993, SCIA hearing, S. Hrg. 103-225, on S. 925 Native American Trust Fund Accounting and Management Reform Act of 1993, (companion bill to Representative Synar's bill, H.R. 1846).

September 22, 1994, "Financial Management: Focused Leadership and Comprehensive Planning Can Improve Interior's Management of Indian Trust Funds," (GAO/AMD-94-185). ("Interior continues to develop piecemeal management improvement plans that do not provide the comprehensive approach to correcting fundamental problems in the way Interior agencies carry out their trust fund functions.")

October 25, 1994, President signs American Indian Trust Fund Management Reform Act of 1994, (AITFMRA) P.L. 103-412.

March 8, 1995, GAO Testimony, "Indian Trust Funds Cannot Be Reconciled" (GAO/AMD-T-95-94) (Before the House Committee on Appropriations).

September 13, 1995, SCIA hearing, S. Hrg. 104-340, on nomination of Paul Homan to be Special Trustee.

September 29, 1995, GAO Letter Report, draft legislative proposal on reconciliation and settlement of tribal trust funds (GAO/AIMD/OGC-95-237R).

February 9, 1996, Secretary Babbitt issues Secretarial Order 3197, Establishment of the Office of Special Trustee and Transfer of Trust Funds Mgt. Functions from the BIA (Order terminates on October 1, 1997).

June 10, 1996, *Cobell v. Babbitt* filed in the U.S. District Court for the District of Columbia, referred to Judge Royce C. Lamberth.

June 11, 1996 SCIA Hearing, 104-514, Indian Trust Funds 1995, the primary witness is the GAO, which presented testimony on its report: "BIA's Tribal Trust Fund Account Reconciliation Results," (May 3, 1996, GAO/AIMD-96-63) ("[B]ecause [the] BIA's report package did not explain or describe the numerous changes in the reconciliation scope and methodologies or the procedures that were not performed, the limitations of the reconciliation were not evident.")

January 1997, Senator Campbell assumes chairmanship of SCIA.

February 4, 1997, Judge Lamberth certifies the named plaintiffs in *Cobell v. Babbitt* as representative of a class consisting of all resent and former IIM account holders.

April 1997, Special Trustee submits his proposed Strategic Plan, as required by AITFMRA.

May 21, 1997, Sec. Babbitt writes letter stating that the proposed Strategic Plan "fails to meet the objectives of the AITFMRA."

May 23, 1997, GAO, Letter Report, "Tribal Account Holders" Responses to Reconciliation Results" (GAO/AIMD-97-102R).

July 28, 1997, SCIA holds hearing S. Hrg., 105-295, on Special Trustee's Strategic Plan, Special Trustee Paul Homan testifies.

August 22, 1997, Sec. Babbitt issues memorandum on Trust Improvement Project Definition: "Notwithstanding my reservations about certain aspects about certain aspects of his Plan, selected trust systems improvements and data cleanup efforts in the Plan can and should proceed as soon as possible within the organizational structure of the Department." Secretary Babbitt calls for the creation of a "high level implementation plan."

November 13, 1997, DoI issues press release on a proposal for the settlement of tribal accounting claims against the United States.

April 16, 1998, DoI submits Settlement Proposal for tribal trust funds to Congress. Introduced at the end of the month by Congressman Miller (by request) as H.R. 3782.

July 22, 1998, SCIA hearing, S. Hrg. 105-815, on H.R. 3782, To Compensate Certain Indian Tribes for Known Errors in Their Tribal Trust Fund Accounts, to Establish a Process for Settling Other Disputes Regarding Tribal Trust Fund Accounts, and for Other Purposes. (The proposal was roundly criticized by Indian tribes and others for "tilting the playing field" in favor of the United States and effectively, if unintentionally, preventing Indian tribes from asserting certain claims.)

May 5, 1998, Judge Lamberth issues a discovery and scheduling order.

July 31, 1998 High Level Implementation Plan issued.

November 5, 1998 *Cobell v. Babbitt*, 30 F. Supp.2d 24 (D.D.C. 1998) ruling denying Interior's motion for summary judgment, etc. and refusal to impose a statistical sampling upon the case as a means of providing an accounting.

December 18, 1998, *Cobell v. Babbitt*, order to show cause why Sec. Babbitt should not be held in contempt.

January 5, 1999, Secretary Babbitt issues Secretarial Order No. 3208, Reorganization of the Office of the Special Trustee.

January 7, 1999, Special Trustee Paul Homan resigns.

January 28, 1999 Secretary's Office provides defense of Order No. 3208 and status report on High Level Implementation Plan February 1999, GAO provides draft report entitled: "Interior Lacks Assurance that Trust Improvement Plan will be Effective," issued as a final report in April 1999 (GAO/AIMD-99-53).

February 22, 1999, *Cobell v. Babbitt*, (1999 WL 101636) Judge Lamberth issues order finding Secretaries Babbitt and Rubin and Assistant Secretary Gover in contempt.

March 3, 1999 SCIA holds a joint hearing with Senate Energy and Natural Resources Committee on Secretarial Order No. 3208, S. Hrg. 106-12. Secretary Babbitt is principal witness. With respect to the contempt citation, Secretary Babbitt stated: "[L]et me just say we apologize to the court for the Government's failures in this litigation."

March 25, 1999, Senator Murkowski introduces S. 739 (to direct the Secretary of the Interior to contract with qualified financial institutions for the investment of certain trust funds) with Senator Campbell as an original cosponsor. (At the request of the bill's sponsors, the Inspector General sought to determine whether Departmental communications constituted illegal lobbying after published reports indicating such lobbying may have occurred.)

April 3, 1999, SCIA holds hearing on BIA Capacity and Mission, S. Hrg. 106-79. April 1999 "Interior Lacks Assurance that Trust Improvement Plan Will Be Effective," (GAO/AIMD-99-53).

June 7, 1999, *Cobell v. Babbitt*, 52 F.Supp.2d 211 (D.D.C. 1999) Judge Lamberth rules on Defendant's motions for summary judgment.

June 25, 1999, Secretary Babbitt "unveils" TAAMS at Billings, Montana.

June and July 1999, Bench trial in *Cobell* (Phase I) case. According to the Court Monitor's second report, at this trial: "Without question, the Federal Government indicated that trust reform was underway and TAAMS was the framework and infrastructure for effecting trust reform."

July 14, 1999, Joint Hearing SCIA/Senate Committee on Energy and Natural Resources, Trust Fund Reform, S. Hrg. 106-146. "Indian Trust Funds: Interior Lacks Assurance That Trust Plan Will be Effective," (GAO/AIMD-99-53). (GAO report: "Until Interior develops an information systems architecture addressing all of its management functions, it can not (sic.) ensure that its information systems will not be duplicative or incompatible or will optimally support its needs across all business areas.") (Don Gray, Esq. "You can not and should not try to operate on yourself, and that is exactly what we're asking well-intentioned BIA officials to do-to work on a problem and to solve a problem where they or their friends . . . may have made mistakes. That is neither fair nor reasonable and in the commercial context would never be countenanced.")

September 8, 1999, According to records revealed to the Court Monitor, a high level meeting was held within the Department concerning TAAMS ("Discuss current TAAMS status and agree on Departmental Policy Position.") Meeting attended by Secretary Babbitt's Chief-of-Staff Ann Shields, Kevin Gover, Daryl White, John Berry, Bob Lamb, and Dom Nessi. (This meeting and the failure to inform either Judge Lamberth or Congress about TAAMS implementation problems are addressed extensively in the Court Monitor's Second Report dated August 9, 2001.)

September 22, 1999, SCIA hearing, Trust Management Reform Act, hearing on S. 1587 (Amending the American Indian Trust Fund Management Reform Act of 1994 to establish within the Department of the Interior an Office of Special Trustee for Data Cleanup and Internal Control) and S. 1589 (Establishing a Indian Trust Fund Reform Commission). According to Secretary Babbitt: "Senator [Murkowski], if you go to Billings, Montana today you will see the TAAMS system running in parallel with the old system."

November 18, 1999, Interior Appropriations Conference report language limits deployment of TAAMS: until and unless the Secretary, "advise[s] the Committees on Appropriations that, based on the Secretary's review and analysis, such systems meet TAAMS contract requirements and user requirements."

December 21, 1999, *Cobell v. Babbitt*, 91 F. Supp. 1 (D.D.C. 1999), decision of Judge Lamberth based on June/July bench trial. The court rules that the Government had a duty to (1) provide an accounting of funds held in IIM trust; (2) create

written plans for collection and retention of IIM trust documents, computer and business systems architecture, and staffing of trust management functions; (3) delay was a breach of trust.

February 8, 2000, Chairman Campbell sends copies of an draft bill entitled Indian Trust Resolution Corporation Act to all Indian tribes.

February 29, 2000, DoI issues second High Level Implementation Plan March 22, 2000, SCIA hearing on the nomination of Thomas Slonaker to be Special Trustee.

March 30, 2000, DoI issues its draft Secretarial Order concerning "trust principles".

April 3, 2000, BIA publishes notice of request for Comments on the Settlement of IIM claims.

April 12, 2000, Chairman and Vice Chairman of SCIA and Chairman of Energy and Natural Resources write to ask the Department to reconsider its draft "trust principles." Confirmation of Special Trustee is blocked over draft "trust principles."

April 28, 2000, Secretarial Order on Trust Principles is issued after it is modified to meet most concerns. Senate confirms Tom Slonaker as Special Trustee.

June 22, 2000, SCIA hearing on draft bill Indian Trust Resolution Corporation Act.

July 14, 2000, DoI proposes regulations concerning the leasing and grazing of trust lands and the management of IIM funds and probate (65 FR 43874).

September 22, 2000 Chairman Campbell and Vice Chairman Inouye and 16 other Senators write to Secretary and ask him not to proceed to finalize most of the July 14, 2000 draft regulations.

September 29, 2000, Interior Appropriations Conference Report, H. Rep. 106-914 on H.R. 4578 (FY "01 Interior Approps.) "[W]hile approving the request to begin an IIM sampling approach, the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results."

December 1, 2000, plaintiffs in *Cobell v. Babbitt* file motion to re-open trial I. They assert that the Government presented false and misleading evidence to support its claim that trust reform was underway.

December 29, 2000, Secretary Babbitt issues Memorandum to proceed with statistical sampling.

January 20, 2001, over the September 22, 2000 objections, the DoI finalizes draft July 14, 2000 regulations. (Regulations are allowed to go into effect by Bush Administration.)

February 23, 2001, U.S. Court of Appeals for the D.C. Circuit issues opinion in *Cobell v. Norton*, 2001 WL 17299 (D.C. Cir.). The decision affirms Judge Lamberth's ruling that the plaintiffs may proceed with their suit against the United States for breach of trust arising out of the government's failure to manage its trust activities. The panel also rules that the Government's duty to account does not arise out of the AITFMRA of 1994.

February 23, 2001, Dom Nessi writes two memorandum raising concerns about the DoI's project for both Trust Reform and Data Cleanup.

February 27, 2001, Secretary Norton issues Memorandum on statistical sampling.

February 28, 2001, Secretary Norton appears before SCIA, announces decision on statistical sampling.

April 16, 2001 Judge Lamberth appoints Joseph S. Kieffer, III as Court Monitor.

July 10, 2001, Secretary Norton issues Secretarial Orders creating Office of Trust Reform and Historical Accounting (Sec. Order 3231) and augmenting the authority of the Special Trustee (Sec. Order 3232).

July 11, 2001, Court Monitor issues his first report on Historical Accounting.

August 9, 2001, Court Monitor issues his second report on TAAMS. This report confirms that the Department misled Congress and the court with respect to trust reform efforts.

November 12, 2001 EDS submits DoI Trust Reform: Interim Report and Roadmap for TAAMS and BIA Data Cleanup November 20, 2001 Office of Indian Trust Transition (OITT) through Secretary Order 3235.

January 16, 2002, DoI submits Status Report #8.

January 17, 2002 First Meeting of Tribal Leaders Task Force January 24, 2002, EDS publishes DoI Trust Reform: Final Report and Roadmap

PREPARED STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Mr. Chairman, I want to thank you for convening this hearing on the Department of the Interior's management—or perhaps mismanagement would be a better term—